

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

- - -

UNITED STATES OF AMERICA, . CASE NO. 1:09-CR-30-1
Plaintiff, .
- v - . *Sentencing*
CHRISTOPHER FREEMAN, . Monday, September 14, 2009
Defendant. . 3:10 p.m.
Cincinnati, Ohio

.

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE MICHAEL R. BARRETT

For the Plaintiff: Timothy D. Oakley, Esq. (AUSA)
United States Attorney's Office
221 East Fourth Street, Suite 400
Cincinnati, Ohio 45202

For the Defendant: Richard Smith-Monahan, Esq.
Assistant Federal Public Defender
Chiquita Center
250 East Fifth Street, Suite 350
Cincinnati, Ohio 45202

Also Present: Robert C. Frommeyer, U.S. Probation
Officer

Law Clerk: Stephanie K. Bowman, Esq.

Courtroom Deputy: Barbara A. Crum

Court Reporter: Maryann T. Maffia, RDR, Official

P R O C E E D I N G S

COURTROOM DEPUTY: The next matter on the docket is District Court Case Number 1:09-CR-30, Defendant Number 1: *United States of America versus Christopher Freeman*.

We're here this afternoon for sentencing.

THE COURT: All right. Would counsel like to state their appearances for the record, please.

MR. OAKLEY: Good afternoon, Your Honor. Tim Oakley for the United States.

THE COURT: Good afternoon, Mr. Oakley.

MR. SMITH-MONAHAN: Richard Smith-Monahan on behalf of the defendant, Christopher Freeman.

THE COURT: And you're Mr. Freeman, correct?

THE DEFENDANT: Yes, sir.

THE COURT: Okay. You want to take your hands out of your pockets, please.

THE DEFENDANT: Yes, sir.

THE COURT: Thank you.

All right. Let's talk about how we got here.

On May 11th of this year, Mr. Freeman appeared before me in the United States District Court for the Southern District of Ohio. He entered a plea to the indictment pursuant to a Plea Agreement. The matter was referred to the Probation Department for a presentence investigation and report, which the Court received. The report was initially prepared on June

1 8th of 2009 and revised about a month ago on August 19th,
2 2009. There was also a Sentencing Memorandum, which has been
3 supplied.

4 Mr. Oakley, have you received a copy of all the documents
5 in this case?

6 MR. OAKLEY: I have, Your Honor. Thank you.

7 THE COURT: Mr. Smith-Monahan, have you received a
8 copy of all the documents in this case?

9 MR. SMITH-MONAHAN: Yes, Your Honor. Judge, you did
10 get a copy, I assume, of the treatment report from Northland?

11 THE COURT: Yeah, I did. I'm looking for it right
12 now.

13 Does Barb have that?

14 COURTROOM DEPUTY: Judge, I'll just give you my copy.

15 THE COURT: Okay.

16 Hang on one second, guys.

17 Did you get a copy of that, Mr. Oakley?

18 MR. OAKLEY: Your Honor, I did, and Mr. Smith-Monahan
19 has handed me another copy just now.

20 THE COURT: Richard, just so you know, I received a
21 copy of that, and I've discussed it with the Probation
22 Department. The Probation Department expressed that the
23 author of the report -- how do I put this? -- is a straight
24 shooter and has done good work in the past.

25 MR. SMITH-MONAHAN: Yes, sir. I've spoken with both

1 of them. He has two counselors up there. The one you got a
2 report from was his individual counselor. He also has a group
3 counselor.

4 THE DEFENDANT: Yeah.

5 MR. SMITH-MONAHAN: And I've spoken with him.

6 THE COURT: All right. Before I address the factual
7 findings for the sentence, I'd like to review something we
8 talked about at the time of the plea, and I just want to
9 review this for the record.

10 Under the Sentencing Reform Act of 1984, the United States
11 Sentencing Commission issued guidelines. At that time,
12 federal judges were required to follow those guidelines in
13 determining sentences in criminal cases. Due to Supreme Court
14 decisions since that time, the Court has said that it's
15 unconstitutional for judges to be required to follow the
16 guidelines in sentencing, but that it was constitutional for
17 the judges to be required to consider the guidelines as one of
18 the factors in determining a sentence, which I have and will
19 do along with the factors discussed in 18 U.S.C. 3553.

20 The Court has the authority to impose a sentence which
21 could be more or less severe than that suggested by the
22 guidelines, and the sentence is determined by the standard of
23 reasonableness and the minimum and maximum penalties provided
24 by the Code for the offense of conviction.

25 In terms of sentencing facts, Richard, is there anything

1 other than what's in the report that you wish to bring up at
2 this time?

3 MR. SMITH-MONAHAN: We have nothing other than what
4 was raised in our objection letter and our Sentencing
5 Memorandum, Your Honor.

6 THE COURT: Okay. And review the objection letter
7 for me.

8 MR. SMITH-MONAHAN: And the objection letter is also
9 the subject of the Sentencing Memorandum, but it's an
10 objection to the four-level enhancement applied by Probation
11 under the guidelines for basically selling or trafficking in
12 firearms.

13 THE COURT: Okay. We'll cover that in just a minute
14 then.

15 Mr. Oakley, is there anything else you wish to present at
16 this time?

17 MR. OAKLEY: We may present some testimony that would
18 correspond with the facts in the PSR, but nothing else right
19 now.

20 THE COURT: Okay. Reserving the objections until we
21 talk about it in a few moments, the Court -- as it relates to
22 the factual statements contained in the presentence
23 investigation, we'll adopt those factual statements as the
24 Court's findings of fact, including that Mr. Freeman entered a
25 valid plea to Count One of the indictment and was and is

1 adjudged guilty in Case Number 1-09-CR-30-1, Possession of
2 Stolen Firearms, a Class C felony, which is a violation of
3 18 U.S.C. 922(j) and 924(a)(2) and 2, which subjects him to up
4 to ten years of possible imprisonment, a \$250,000 fine, three
5 years of supervised release, a \$100 special assessment.

6 Because of the dates of this offense, the 2008 edition of
7 the Guidelines Manual was used to calculate the offense level
8 and the guideline imprisonment range.

9 The guideline for a violation of 18 U.S.C. 922(j) is found
10 at Sentencing Guideline 2K2.2.1. Pursuant to 2K2.1(a)(7), the
11 base offense level is 12 if he has not previously been
12 convicted of a felony offense and all the stolen firearms were
13 handguns.

14 Pursuant to 2K2.1(b)(1)(C), the offense level is increased
15 by four levels if the offense involved the defendant's
16 possession of 36 stolen firearms, because the offense involved
17 36 firearms.

18 2K2.1(b)(4)(A) deals with a two-level adjustment for
19 possessing -- excuse me. A two-point adjustment under
20 2K2.1(b)(4)(A) is not an appropriate enhancement in this case
21 because the underlying offense is a violation of 922(j), and
22 the base offense level takes into account that the firearms
23 that were stolen pursuant to Note 8(A) under Guidelines 2K2.1.

24 Under 2K2.1(b)(5), if there was trafficking of firearms
25 involved, there was an increase by four levels.

1 In this case, Mr. Freeman was responsible for stealing 36
2 firearms on at least four separate occasions: one in
3 Sardinia, where he sold the guns to his cousin and his uncle;
4 one in Avondale, where he and Mr. Roehm bartered and sold guns
5 to a drug dealer; eight guns were given to Mr. Roehm, and
6 those were to be sold eventually to an undercover agent;
7 Mr. Freeman engaged with Mr. Roehm in presenting three guns to
8 an undercover agent, also to be sold.

9 So he participated in transporting, transferring and
10 disposal of two or more firearms to another individual.

11 Based upon these transactions, the four-level enhancement
12 applies in this case.

13 According to 2K2.1(b)(6), if he used or possessed any
14 firearm or ammunition in connection with another felony or if
15 he possessed or transferred any firearm or ammunition with the
16 knowledge or intent or reason to believe that it would be used
17 or possessed in connection with another felony, there is a
18 potential increase by four levels.

19 And I think, Richard, that's where your objection speaks;
20 is that correct? That's the basis of your objection?

21 MR. SMITH-MONAHAN: Our objection is to Paragraph 40
22 and 41, really, where Probation concluded that the four-level
23 enhancement for trafficking in firearms is appropriate.

24 THE COURT: Okay. Why don't you speak to your
25 objection now.

1 MR. SMITH-MONAHAN: Okay. This guideline section
2 2K2.1(b) (5) provides for a four-level enhancement if the
3 defendant trafficked in firearms, which, you know, means
4 selling the guns.

5 THE COURT: Right.

6 MR. SMITH-MONAHAN: And our position is that
7 Mr. Freeman was obviously convicted of selling the guns. That
8 was the charge in the indictment. It was for possession and
9 disposing of the firearms. So we submit under the cases cited
10 in the Sentencing Memorandum, *United States versus Gibson*,
11 *United States versus Farrow*, *United States versus Duckro*, all
12 Sixth Circuit cases that where "the same" -- and this is a
13 quote from the Court in *Gibson*:

14 Where "the same aspect of a defendant's conduct factors
15 into his sentence in two separate ways," that constitutes
16 impermissible double counting.

17 In this case, obviously, the sale of the stolen firearms
18 was an element of the offense for which Mr. Freeman was
19 charged. In other words, had it gone to trial, the government
20 would have had to prove as an element of the offense that he
21 sold firearms. So when he enters a plea of guilty to that
22 count, he is necessarily -- that conduct is encompassed within
23 the count of conviction, selling firearms.

24 Mr. Freeman is not separately a convicted felon. There is
25 no separate reason to -- I point to the example of Mr. Roehm,

1 who was the co-defendant, who was a convicted felon. His
2 possession of firearms in and of itself is a felon.

3 But in regards to Mr. Freeman, it's this statute that he
4 is charged under. The possession and the disposition of
5 stolen firearms is what made his conduct illegal and, thus,
6 what drives his base offense level under the guidelines of an
7 offense level of 12.

8 Obviously, I didn't see Mr. Roehm's Presentence Report,
9 but I would speculate he had a higher Base Offense Level
10 because his possession of firearms was independently an
11 offense. He is a prohibited person. Mr. Freeman was not.

12 So it's solely his conviction. It's solely the selling of
13 the firearms, the conviction itself, which is what drives him
14 to this offense level of 12.

15 Therefore, we believe, because of that fact, that counting
16 again the fact that he sold the firearms and giving him a
17 four-level enhancement for it is double-counting under these
18 circumstances, and it's unfair. You know, it's his sale of
19 the firearms that got him in trouble. It calculates that the
20 -- the basis for the computation of the guideline, and then to
21 stack on another four levels because he sold the same firearms
22 seems unfair. We would think it submits under this concept of
23 punishing the same aspect of this conduct twice.

24 So we ask the Court to consider an -- although that is
25 what the guidelines say, under the Sixth Circuit case law we

1 would submit that it's impermissible double counting.

2 I think two of the Sixth Circuit cases are strong indicia
3 -- the holdings in two of those cases are strong indicia that
4 this is double counting. One is that *Gibson* case. It was
5 kind of an odd statute, but it was prosecuting mine operators.
6 They are prosecuted and they are given -- they are mine
7 operators and that's the basis, one of the elements of the
8 offense, they'll also get a leadership enhancement. The Sixth
9 Circuit said no, the fact that they were the operators of the
10 mine is what permitted the prosecution. That was an element
11 of the offense they were charged with. Therefore, you can't
12 also stack on a leadership enhancement because but for them
13 being mine operators, they wouldn't have been prosecuted.

14 Similarly, the *Farrow* case, the defendant is charged with
15 felonious assault-type offense, an assault-type offense for
16 assaulting a federal officer with a vehicle, so that's the
17 basis for the conviction. He also gets a big enhancement for
18 using a vehicle or using a "dangerous weapon" to commit the
19 offense. So he is convicted for the conduct, and he's given
20 enhancement for the same conduct. The Sixth Circuit said no
21 in *Farrow*, that's impermissible double counting.

22 We would submit that the circumstances in this case are
23 factually indistinguishable from those two cases. Here you
24 have a defendant convicted of selling firearms, and then you
25 turn around and you give him a four-level enhancement for

1 selling firearms.

2 Under the circumstances of this case, we would submit that
3 that four-level enhancement is not appropriate.

4 We believe the correct guideline computation of 12 plus 6
5 is 18, minus 3 for acceptance of responsibility is 15.

6 THE COURT: I think Mr. Oakley's memorandum in
7 response correctly dealt with the mine case in *Eversole*. I
8 think under 2K2.1(b)(6), if Mr. Freeman used or possessed any
9 firearm or ammunition in connection with another felony, or
10 possessed or transferred any firearm or ammunition with
11 knowledge or intent or reason to believe that it would be used
12 or possessed in connection with another felony, there is an
13 increase of four levels.

14 I know you disagree with some of reasoning, but the fact
15 of the matter is the firearms were obtained by the breaking
16 and entering into the Antiques Gun Store on February 11th,
17 2009. I think that that conduct in and of itself constitutes
18 a separate felony type of offense, and I believe that the
19 counting done by the Probation Department in this case was
20 appropriate.

21 So the objection will be overruled.

22 Mr. Oakley, I didn't really give you a chance to respond,
23 so if you want to -- if you think anything else needs to be
24 said for the record, you could make that argument now.

25 MR. OAKLEY: Your Honor, if I could. First, I

1 believe the statute can be -- or Mr. Freeman could have been
2 convicted for receiving stolen firearms or possessing stolen
3 firearms also, and that's what the evidence would have been.
4 I don't believe it necessarily has to be disposing of stolen
5 firearms.

6 But, second of all, Your Honor, in looking at the *Eversol*
7 case, where separate enhancements "penalize distinct aspects"
8 of a defendant's conduct, no double-counting will be involved.

9 As it's noted, he gets a 12-point base offense for
10 possession of stolen firearms, and then there is an additional
11 four-level enhancement for the trafficking because the
12 trafficking creates a distinct aspect with its own separate
13 harms. I think that's the key to double counting.

14 When Mr. Freeman was out, not only did he burglarize the
15 arcade or the antique store with the firearms, but in his
16 trafficking the weapons, these weapons are being transmitted
17 to drug dealers, drug users, and are now, at this point,
18 untraceable. It's a pretty dangerous situation to society at
19 large and to anyone, including officers, who now come into
20 contact with these people because they are armed with weapons
21 that cannot be traced back to the source of where they came
22 from.

23 I think that's what the guideline enhancement is about.
24 We think the enhancement is appropriate, and we appreciate the
25 Court's finding.

1 THE COURT: And I agree with Mr. Oakley's comments on
2 that.

3 Richard, if you want to -- so the objection will be
4 overruled. If you want to further supplement the record, you
5 can, or if you think you've got it covered --

6 MR. SMITH-MONAHAN: Well, I just wanted to -- you
7 mentioned 2K2.1(b) (6), and my reading of the Presentence
8 Report is, Probation did not give Mr. Freeman an enhancement
9 under 2K2.1(b) (6) for possessing the firearm in relation to
10 another felon. Probation concluded that enhancement was not
11 appropriate. The government did not object to that finding.

12 THE COURT: I think it's under 2K2.1(b) (5) where the
13 enhancement occurs; is that correct?

14 MR. SMITH-MONAHAN: That's where Probation -- when
15 you responded to me earlier, you mentioned the next
16 enhancement, which Probation did not actually score, nor did I
17 when I was arguing -- -

18 THE COURT: I may have misspoken on that.

19 MR. SMITH-MONAHAN: So just in response to what
20 Mr. Oakley said about 2K2.1(b) (5), which -- so I've been clear
21 on the record, is paragraphs 39, 40 and 41 of the Presentence
22 Report.

23 THE COURT: 42 was the section I was talking about.

24 MR. SMITH-MONAHAN: Right.

25 THE COURT: So I misspoke on that, and you're

1 correct.

2 MR. SMITH-MONAHAN: Mr. Oakley mentioned the
3 burglary, and I want to say this:

4 We haven't disputed any of those facts. What we're
5 disputing is, he wasn't charged with burglary.

6 If we were standing here and this prosecution were
7 burglary with firearms and he were getting a four-level
8 enhancement for selling firearms, we would not be making this
9 argument because the burglary would not have been considered
10 already in the underlying charge.

11 But he was not even charged with the burglary of firearms.
12 The indictment charged him only with the possession -- it's
13 possession, receipt and disposition of the firearms, or sale
14 of the firearms. That's all the indictment charged him with.

15 So I, frankly, think any discussion about the burglary in
16 regard to this point is irrelevant because he wasn't charged
17 with it. If he were charged with it, I wouldn't be making
18 this argument.

19 The point is, this sale of the firearms -- look at the
20 Statement of Facts in this case. All it talks about is
21 selling firearms, the Statement of Facts attached to the Plea
22 Agreement. That's what he pled guilty to, is the Statement of
23 Facts they read. It talks only about the sale of firearms,
24 and that is what he is getting a four-level enhancement for.
25 That is what he pled guilty to. That is what the indictment

1 charged. Therefore, we would submit that that is double
2 counting under these circumstances.

3 THE COURT: I'm satisfied that the record on the
4 objection that I've overruled is sufficient.

5 But, Mr. Oakley, if you think anything else needs to be
6 added, you may.

7 MR. OAKLEY: Not at this point, Your Honor, no.

8 THE COURT: Okay.

9 There was no adjustment for role in the offense because he
10 was neither a leader nor a minor participant. He was held
11 accountable for his own behavior in the case.

12 Acceptance of responsibility, he has been given a
13 two-level reduction and the additional one-point reduction.
14 His criminal history is only one point, so he has a Criminal
15 History Category of Roman Numeral I.

16 Term of supervised release following a term of
17 imprisonment would be up to three years, including mandatory
18 conditions regarding not violating any other federal, state or
19 local crimes, collection of DNA, and not using controlled
20 substances, and testing to ensure those provisions.

21 Maximum fine, I've already said, is \$250,000. There is
22 always a \$100 mandatory assessment in this case.

23 So those are the way the guideline recommendations shake
24 out, which would be -- excuse me?

25 (Mr. Smith-Monahan confers privately with the defendant.)

1 THE COURT: An offense level of 19 with a Criminal
2 History Category of I, and the guideline provision is 30 to 37
3 months. As you know, Richard, there has been a request for an
4 upward departure based upon conduct.

5 So other than the objections already stated, anything as
6 to the calculation of the guidelines?

7 MR. SMITH-MONAHAN: No, Your Honor, nothing more
8 about the calculation of the guidelines.

9 THE COURT: Okay. Is there anything that you or your
10 client wishes to say in respect to mitigation of the potential
11 sentence?

12 MR. SMITH-MONAHAN: Yes, Your Honor.

13 THE COURT: Go ahead.

14 MR. SMITH-MONAHAN: We have -- the second part of the
15 Sentencing Memorandum, we objected to the upward departure and
16 grouped that together with a discussion about request for a
17 variance below the recommended guideline range. So, if I may,
18 I'll just address those as one consideration. I think it's,
19 at this point, a determination of the 3553 factors.

20 Obviously, the Court knows, Mr. Freeman is Criminal
21 History Category I. He comes into this case with a few minor
22 skirmishes with the law. This is his first adult felony
23 conviction. He stands before the Court, under the guidelines,
24 as someone that presents a low likelihood of recidivism based
25 on the Commission's view of individuals, lowest criminal

1 history category possible.

2 He's only 21 years old. That's obviously a very young
3 age. He has been an adult for three years, and it's a very
4 impressionable age, and it's an age which is probably really
5 critical what happens here forward and what the rest of his
6 life looks like.

7 Prison can have two different effects on people. As I'm
8 sure the Court knows, one of those effects is teaching --
9 getting someone around a bunch of hardened criminals where
10 they learn a lot of negative things. That's something that
11 prison can do, and that's something that the sentence we are
12 proposing, that we are hoping to try to keep him away from
13 that influence.

14 I know there has been some factual argument back and forth
15 between the government and I about the influence Mr. Freeman
16 was subjected to in his life. I know you sentenced Mr. Roehm
17 this morning, but you can see some of the comments from my
18 client's father in the Presentence Report. I pointed those
19 out in the Sentencing Memo, that co-defendant Roehm and his
20 gang that they hang with were some of what got Mr. Freeman
21 going down the wrong path in his using drugs, being involved
22 in criminal activity. That was a lot of the basis for the
23 fight between my client and his father, is my client's father
24 seeing that this is a bad influence for him and he needs to
25 keep him away from these people. But he was hanging around

1 with him and, sure enough, here he is in trouble.

2 He has got, as you know, a heroin addiction. That is --
3 no bias. I think he has made some pretty candid admissions in
4 this case about trading guns for drugs, using -- you know,
5 selling guns to have money to buy drugs. He was high at the
6 time he did this, and he was using heroin pretty heavily. I
7 know we all know that heroin is a highly addictive drug, and
8 he appears to have been firmly in its grasp at the time he did
9 this.

10 And I realize that's an argument that cuts two ways. The
11 last thing you want is people out there is high on drugs
12 committing crimes.

13 Now we can look at what Mr. Freeman is doing to try to
14 deal with that problem. Admittedly, it is part of the
15 underlying problem. That why he's in trouble today. Because
16 he is using drugs illegally, he is needing to feed that habit,
17 and he chose to make some really, really bad decisions
18 surrounding that.

19 You let him out on bond at the time of his plea hearing.
20 He had two options on what he could do at that point: he
21 could go back and use, or he can really try to clean his life
22 up.

23 I think if you've looked at what's happened, sure, it
24 hasn't been perfect. You know, it hasn't been perfect, but I
25 think he's really shown you that he's tried.

1 I know when I first met him at the jail, he was coming
2 down and detoxing from heroin sitting in the county jail.
3 That was hard. He was a complete mess. That's where he came
4 from: first the detox in the jail and now trying to get back
5 out really into the same world he was living in but be
6 drug-free.

7 And I'm going to let his dad talk in a few minutes. I
8 know you heard from him at the plea hearing about how hard
9 that is on him and how hard it's been and then how committed
10 they are to keeping him from doing that again.

11 But look at what he's doing. He has been on house arrest
12 since the day you let him out. He is still on house arrest as
13 we stand here today, so he's spent four months now on house
14 arrest. He has been engaged in treatment at Northland. I
15 think I gave Mr. Oakley my only report, the only copy of that
16 report, but look at what it says in here.

17 "Excellent progress so far" is what this counselor
18 indicated. He attends twice weekly at the treatment program.
19 This is on the bottom of Page 1. "Mr. Freeman started
20 attending intensive out-patient program June 15th and has made
21 excellent progress thus far."

22 In the second page, "In review of Mr. Freeman's progress,
23 he completed a thorough first step assignment and was able to
24 acknowledge his powerlessness and unmanageability to his drug
25 addiction, verbalized sincere recognition of his legal

1 problems, and sees how his drug addiction has placed in
2 criminal behavior."

3 It's given him some opportunity to attend AA and NA
4 meetings that were -- as he could get them approved on his
5 electronic monitoring. "Patient reports having good
6 experience with attendance at NA meetings."

7 He's had a little bit of trouble finding employment. Some
8 of that has been being on house arrest. Then when you go to
9 do a job interview, Pretrial has got to call the employer.
10 You can imagine how hard it is to get an employer to hire you
11 in that situation.

12 This current situation, as of today -- he could have
13 started today but for court. So he thinks they've got a
14 placement for him at L3 starting next Monday, so he would be
15 working and continuing his treatment.

16 You see that the treatment specialist there suggests that
17 they can continue these services with him at this facility.
18 They have extended continuing care monitoring for up to a year
19 with his program. I know that the Court sometimes is
20 concerned about disrupting something that's going on. I think
21 Mr. Freeman is standing before you with something that's going
22 on that's good.

23 I know it is a huge chance when a defendant stands up in a
24 case like this and asks for a big break, Your Honor, and we
25 realize some of the facts of this case are disturbing to the

1 Court. I want to talk about that in a minute.

2 We have a defendant with a minimal record, a drug
3 addiction that we can see is probably pretty clearly the cause
4 of why he is here, being involved with a crowd of people that
5 got him into this type of conduct, so he's a guy to take a
6 chance on. He's 21 years old. He's young and has a chance
7 not to go to prison and learn some negative things. He has
8 shown you how serious he is about rehabilitation.

9 I want to just comment on the facts of the case because I
10 know that Mr. Oakley is going to talk a lot about them and I
11 know they are a big concern to the Court. We're not here
12 disputing the facts. We're not here to tell you he didn't do
13 this. He did it. He was really wrong. He is confessing that
14 he was wrong.

15 You know, I know there is a concern about the incident
16 with the planned robbery. I wanted to point this out to the
17 Court, that that's what my client told the agents that upon
18 his arrest. It's my belief from having read the paperwork
19 that's how they found out about that, is he told them, "Hey,
20 you know, I was planning on robbing him. I didn't know he was
21 an agent." He didn't do it, you know. In one sense, the
22 upward departure and these kinds of things are really
23 punishing him for what he was thinking and planning on doing
24 but didn't act on.

25 So, you know, he was honest about it and has been honest

1 from the time of his arrest about that. He was very candid.
2 Now he is obviously subjected to punishment for his honesty.
3 But, at the very least, he is a gentleman who has been
4 forthright and he's a gentleman trying his best now to deal
5 with the problem that got him where he is standing.

6 With all of those circumstances, I know your guideline
7 range is 30 to 37 months. You have discretion to go down as
8 low as you want. There is nothing mandatory in this case. We
9 ask you to exercise that discretion and go down substantially
10 in this case.

11 Yes, Judge.

12 THE COURT: There is one other item that you may want
13 to comment on before we move on. This morning in the
14 sentencing of the co-defendant, Mr. Whitley, who was the owner
15 of the firearms store, was present. I believe you have been
16 given a copy of the transcript which occurred at that time,
17 but for purposes of this sentencing I'm going to read what I
18 believe was the relevant portion.

19 This is Mr. Whitley starting on Line 19.

20 MR. SMITH-MONAHAN: Which page, Judge? I'm sorry.

21 THE COURT: Page 2.

22 "I am a federal firearms licensed dealer, and I have a
23 list of damages and any articles that were stolen out of my
24 building. The total is over \$30,000. I had no insurance
25 because I had a small break-in a year before, and I went ahead

1 and installed steel bars around all the windows and the doors,
2 and I had a backup battery security system.

3 This particular night on February 12th, the electric was
4 out in Bethel from a storm. I had a backup satellite in case
5 this happened. That particular night, the Russian satellite
6 and the American satellite crashed in outer space. We had no
7 security from 2:30 to 5:30 in the morning, and that's when the
8 break-in occurred, sometime between 2:30 and 5:30 in the
9 morning."

10 Did we give Richard a copy of that list?

11 COURTROOM DEPUTY: No, we did not.

12 THE COURT: He provided us a list which had the
13 damages to his shop and also had a listing of the firearms
14 that were taken which Mr. Oakley had indicated he would be
15 able to check off some of those firearms as being recovered.

16 So do you wish to -- in your mitigation, do you wish to
17 discuss restitution as well?

18 MR. SMITH-MONAHAN: Well, we're not getting -- this
19 is the first I had seen of those dollar amounts. I don't
20 believe we are going --

21 THE COURT: Actually, I think the presentence
22 investigation had it listed the 27,000, didn't it?

23 MR. OAKLEY: Yes, with the recovery of almost 8,000.

24 MR. SMITH-MONAHAN: We're not going to dispute what
25 the Court wants to order in restitution that it deems fair.

1 Mr. Freeman is willing to make every effort, once he is
2 employed, to try to make recompense for his wrongs here. We
3 have no intention of disputing -- if the man said he's lost
4 money and that's verified through the Probation Department and
5 the Court, we're not going to dispute him paying that back.

6 Obviously, a long period of incarceration would hinder his
7 effort to try and do that, but he is standing here with every
8 intention of trying to make good on the damage he did. That's
9 what we'll say in that regard.

10 I had finished what I intended to say. I believe my
11 client's father would like to say a few words to the Court, if
12 you'll permit him to do so.

13 THE COURT: Certainly.

14 How you doing? Could you state your full name and spell
15 your last name so the court reporter can take it down.

16 MR. THOMAS P. FREEMAN: Thomas P. Freeman,
17 F-r-e-e-m-a-n.

18 THE COURT: Go ahead, Mr. Freeman.

19 MR. THOMAS P. FREEMAN: Sir, I'd just like to say
20 that my son did do a grave consequence. He's got to be
21 accountable for his actions. But, you know, he's just -- he
22 is 21 years old. He's a young man. I just -- I think after
23 talking with my son since he is on his, since he was released,
24 that, in my honest opinion, he was just at the wrong place at
25 the wrong time with the wrong crowd.

1 I just feel as a parent -- I just want to say that
2 everything that I've read and everything that I've just looked
3 into, that the statistics are pointing at when a person goes
4 to prison, especially a young person, the odds are just really
5 high that they are going to be led into a more criminal
6 activity because of being with the criminal element.

7 I'm just hoping, Your Honor, you could show a little bit
8 of leniency, give him a chance to do what's right. I think
9 that he's more than willing to show the Court is he is wanting
10 to do what's right.

11 Again, I'd like to just add, sir, that I'm just -- I would
12 like for you to show a little bit of leniency.

13 THE COURT: And I appreciate your efforts in regard
14 to your son's conduct before. Thank you.

15 MR. THOMAS P. FREEMAN: Thank you, sir.

16 MR. SMITH-MONAHAN: Do you want to say something?

17 THE COURT: Mr. Freeman want to talk to me?

18 MR. SMITH-MONAHAN: He has a few comments, Your
19 Honor.

20 THE DEFENDANT: Yes. I don't know. I ain't never
21 been in trouble before. I ain't never went to jail. I got --

22 THE COURT: Those are two separate things,
23 Mr. Freeman. You have been in trouble before, but you've
24 never been to jail.

25 THE DEFENDANT: Yeah, I ain't never been to jail

1 before. Like I say, I did three months in Butler County, you
2 know. That's probably what scares me the most, is going back
3 to jail.

4 The time I was out on bond, you know, I had a lot of time
5 to think about how it affected me and my family. But I'm not
6 disputing anything on what you give me because I accept the
7 responsibility. I can't fight what I did wrong, you know.
8 Can't put it off on no one else.

9 If you would show some lenience, I'd appreciate it.

10 I have been clean since then and going to continue doing
11 my Northland and drug treatment. I don't want to live that
12 life no more.

13 That's all I got to say. Thank you.

14 THE COURT: Thank you.

15 Mr. Oakley, do you have anything you want to say at this
16 time?

17 MR. OAKLEY: Your Honor, I guess if there is no real
18 dispute about the facts other than who committed the burglary,
19 we don't need to put on any evidence, I don't think. In
20 looking at the PSI, if there is no dispute, then there is no
21 dispute that Mr. Roehm is the one who received all the money
22 for the stolen weapons. He is the one who got paid.

23 Mr. -- I'm sorry. Mr. Freeman is the one that got all the
24 money. Mr. Freeman paid Mr. Roehm \$80. So to make some type
25 of allegation that Mr. Roehm was the driving force behind

1 this, I think, misspeaks of the facts.

2 Second of all, Your Honor, the robbery, in paragraph 28,
3 wasn't because Mr. Freeman changed his mind; it was because he
4 couldn't get into the trailer where the shotgun was located.
5 Otherwise, we would have been here -- hopefully not, but we
6 would have been here on entirely different circumstances with
7 different charges.

8 This is an operation that was conceived, driven and
9 benefitted by Christopher Freeman.

10 I know he's a young man, I know he doesn't have much of a
11 criminal history; but thanks to him, 20-plus guns are still
12 out on the streets of Cincinnati and throughout Southwest
13 Ohio. The Court should take that into consideration when it
14 considers the nature of the offense and the risk to society
15 that Mr. Freeman has caused, not to mention the damage that he
16 did to Mr. Whitley in burglarizing his store.

17 We think the guidelines are appropriate, and we also think
18 that the recommendation of the upward departure based on the
19 overall operation led by Mr. Freeman is appropriate. We would
20 ask the Court to give him, at a minimum, the 37 months. If
21 the Court is so inclined, we would agree with an upward
22 departure from that.

23 THE COURT: Well, the sentence I'm about to impose,
24 in my judgment, takes into consideration the nature and
25 circumstances of this particular offense and, Mr. Freeman,

1 reflects seriousness of the offense, promotes respect for the
2 law, and will provide just punishment as well as afford
3 adequate deterrence to any additional criminal conduct that
4 Mr. Freeman may have contemplated or with others similarly
5 situated may have contemplated.

6 It will protect the public from further crimes and provide
7 him with needed educational or vocational training.

8 I appreciate what Mr. Freeman, Senior tried to do in this
9 particular matter, and I appreciate the supervision he tried
10 to give his son earlier. But to be clear and fair, at the
11 time that I let Mr. Freeman out on bond, I obviously had a
12 copy of Mr. Roehm's record but not a Presentence
13 Investigation. I had a copy of Mr. Freeman's record but not a
14 Presentence Investigation.

15 At that time, I was willing to listen to the fact that the
16 young heroin addict was influenced by the older, allegedly
17 more mature heroin addict. In looking at the comparative
18 records, it seemed to make sense.

19 Since that time, I think I've come to conclude that
20 Mr. Freeman was actually the person that schemed to break into
21 the gun shop and steal the firearms. As a juvenile, he broke
22 into a car, stole a stereo, and also stole some rims and tires
23 at different times.

24 As indicated by Mr. Oakley, he controlled the flow of the
25 stolen firearms for sale and bargained for drugs for the time

1 that this offense lasted. Both Mr. Freeman and Mr. Roehm went
2 into Avondale, sold guns to unidentified heroin dealers in
3 exchange for drugs.

4 When I do the sentence in this case, I need to look at
5 what I've given Mr. Roehm in terms of fairness. I've taken
6 his record into consideration.

7 But also, Mr. Freeman, and Richard can tell you and Tim
8 Oakley can tell you that at least on a weekly basis that
9 people like the folks you sold your guns to come in front of
10 me, and they start looking at five or plus years just out of
11 the gate for having the guns, and you're the guy that's giving
12 them the guns.

13 That's a concern, not just because of the fact that the
14 City of Cincinnati and the surrounding area is heavily engaged
15 in Project Disarm to get the guns off the street, but in terms
16 of just understanding the flow of guns and how these things
17 get into the hands of these known felons, I think it's
18 important, but also the number of guns that are still
19 unaccounted for, the number of guns that you put into
20 circulation I think is important in this case.

21 Even though you were high on drugs, the fact of the matter
22 is -- and Richard said that you gave up the evidence that led
23 the probation officer to conclude that you were going to rob
24 the undercover agent. But, as Mr. Oakley pointed out, you
25 were going to rob the undercover agent, you had trouble

1 getting to the shotgun that you were going to use to rob this
2 guy.

3 You have an armed, high robber come in contact with an
4 armed undercover agent, there is no telling what would have
5 happened. That's part of the reason we are tough on the
6 criminals that come in here just carrying guns. You know,
7 they say they're carrying them for their own protection, but,
8 more often than not, innocent people get involved in their
9 criminal conduct.

10 5K2.0(a)(2)(B) permits a departure in cases where there is
11 circumstances the Sentencing Commission does not identify but
12 is nevertheless appropriate, and I think this is such a case.
13 Short of a locked door, I think we would have had a very
14 serious confrontation there. I think that that's something I
15 need to take into consideration in this case, plus the types
16 of sentences that I give people for possessing firearms in
17 these situations, and also Mr. Roehm --

18 What did I give him, Tim, 67 months?

19 MR. OAKLEY: 67 months, yes.

20 THE COURT: I gave him a more severe sentence based
21 upon his record, but I'm not sure, Christopher, who was
22 leading who down the path in this situation. The evidence
23 points, to me, that actually you were leading him down -- the
24 younger junkie was leading the older junkie down the path in
25 this case. I think that the upward departure is warranted in

1 this case.

2 For that reason and what I've stated in the record, I am
3 going to impose a sentence of 43 months to the Bureau of
4 Prisons, three years of supervised release upon completion of
5 the sentence.

6 Upon release from incarceration, you are ordered to report
7 in person to a probation office in the district within which
8 you released, and you have to do that within 72 hours.

9 As I indicated before, the conditions are:

10 You are not to commit any other federal, state or local
11 crimes;

12 Never to possess any firearms or other dangerous devices;

13 Not to possess any illegal controlled substances; and to
14 monitor assurance of that, within 15 days upon your release of
15 supervised release, you'll have at least one drug test and at
16 least two thereafter, but more can be administered;

17 You have to comply with the standard conditions of
18 probation as adopted by the Courts for the Southern District.

19 There will be -- I'm not going to have a fine in this
20 case, but I am going to order restitution in the amount of --

21 Bob, do you have the number handy? It was 27 --

22 MR. FROMMEYER: Your Honor, if I could speak to the
23 restitution issue?

24 THE COURT: Go ahead.

25 MR. FROMMEYER: I'm not sure the Court can order

1 restitution in this case, and the reason is, is because what
2 he was charged with was possession and disposing of the
3 firearms. Restitution is held to the count of conviction.
4 What the property that was alleged in the indictment in Count
5 One was the firearms that were actually part of the
6 transactions with the undercover agent.

7 All of those firearms were recovered and, therefore, I'm
8 not sure the Court can order restitution based upon the
9 burglary and all that because that is not part of the charge
10 and the conduct.

11 THE COURT: Mr. Oakley, do you have an opinion on
12 that?

13 MR. OAKLEY: Your Honor, I don't. This is new to me.
14 I would have thought that the relevant conduct would be such
15 that the restitution would be appropriate.

16 THE COURT: Well, here's what I'm going to do. I'm
17 going to order a condition of supervised release that
18 restitution in the amount of \$27,000 minus the guns that have
19 been recovered, and I'm assuming -- I'm not assuming. I'm
20 hoping that more firearms will be recovered over the next few
21 months, that those will all be credited toward Mr. Freeman's
22 account.

23 What we can do is, the Probation Department, when it's
24 time to put together a schedule, we can see what firearms have
25 been recovered, what firearms haven't, and then deal with it

1 as a condition of supervised release at that time.

2 Obviously, if I'm wrong on this, Richard has heard your
3 argument and he can take it up and get that straightened out.

4 Richard, is there a request for the 500-hour drug
5 treatment?

6 MR. SMITH-MONAHAN: Yes, Your Honor.

7 THE COURT: Okay. That's granted.

8 Mr. Freeman is ordered to provide Probation with a DNA
9 sample and pay the special assessment of \$100.

10 Paragraph 14 of the Plea Agreement, I think, dealt with
11 forfeiture, so any items that are mentioned in there to be
12 forfeited will, in fact, be forfeited.

13 Richard, do you want to renew your previously-raised
14 objections for the record?

15 MR. SMITH-MONAHAN: Yes, Your Honor, I will.

16 Pursuant to the Sixth Circuit's decision in *Bostic*, first
17 of all, we would renew our objection to the four-level
18 guideline enhancement under Section 2K2.1(b)(5), and I would
19 incorporate all of the reasons that we indicated earlier in
20 the hearing that we felt that a four-level enhancement was
21 inappropriate. We believe the correct guideline computation
22 should be 18 to 24 months.

23 Second, we would object to the Court's determination that
24 an upward departure is appropriate and the Court's denial of a
25 downward variance in this case. We would submit that the

1 Court should balance the seriousness of the offense that the
2 Court mentioned against some of the factors that we raised:
3 my clients's age; his drug problem that led him into the
4 problems he was engaged in; his rehabilitative efforts; his
5 efforts of drug treatment; his lack of a criminal record.

6 We would submit when making that balancing of the 3553,
7 that the downward variance -- at least a sentence within the
8 guideline range or, failing additionally, a downward variance
9 in the guideline range was actually appropriate in this case.

10 THE COURT: Mr. Oakley, do you think you need
11 anything regarding those on the record at this point?

12 MR. OAKLEY: No, Your Honor.

13 THE COURT: Okay. Where are we in terms of custodial
14 status, guys?

15 MR. SMITH-MONAHAN: We would request -- I believe
16 Pretrial has submitted a bond report to you which indicates
17 they have no objection to him remaining out on bond. We would
18 ask that you allow him to continue to do so. If you were
19 inclined to agree with that, I had the additional request of
20 allowing him to be off of house arrest awaiting his
21 designation to Bureau of Prisons.

22 I spoke with Mr. Morris from Pretrial about that.
23 Mr. Morris indicated to me they have no objection to him being
24 off of house arrest while awaiting his voluntary surrender.

25 THE COURT: Tim?

1 MR. OAKLEY: Your Honor, I just spoke to Mr. Morris.
2 Maybe there was a miscommunication, but Mr. Morris informed me
3 that the reason that Mr. Freeman has done as well as he has
4 was the electronic monitoring and would, I believe, oppose the
5 removal from that condition. It doesn't hinder Mr. Freeman
6 from going to work. He can notify the Probation Department
7 and then make the scheduling arrangements. You know, if the
8 Court makes it final today, we would have no objection to the
9 bond being continued.

10 We would also be curious as to two questions: One, if we
11 can return the weapons we do have back to Mr. Whitley. I
12 believe the case is concluded to the point where we can return
13 the evidence, if no objection from Mr. Smith-Monahan and the
14 Court.

15 Second is, we were curious if Mr. Freeman was asking for a
16 location nearest his home.

17 THE COURT: We'll get to those in just a second.
18 Let's deal with the middle issue first.

19 Richard, if, in fact, photographs containing serial
20 numbers of the aforesaid firearms were saved and preserved in
21 case something would happen somewhere on appeal, are you okay
22 with the return of the weapons?

23 MR. SMITH-MONAHAN: We have no objection.

24 THE COURT: Okay. So I'll order --

25 Tim, just for file purposes, if you could record serial

1 numbers and photographs of the weapons and keep those safe,
2 that would be fine. The actual weapons themselves, those
3 could be returned.

4 The defendant is a candidate for voluntary surrender, so
5 I'll allow him to do that.

6 I think you owe me an entry of dismissal, don't you, Tim?

7 MR. OAKLEY: No. It was just the one count.

8 THE COURT: Just one-count indictment, all right.

9 And in terms of -- well, the 500-hour drug treatment, and
10 I'm assuming as close to home as possible?

11 MR. SMITH-MONAHAN: Yes, sir.

12 THE COURT: And designation, Barb, as close to home
13 as possible.

14 Both sides are notified that they can appeal the sentence.

15 If you are indigent and cannot retain a lawyer,
16 Mr. Freeman, you may apply and one will be appointed to
17 represent you on appeal.

18 Pursuant to Rule 4(b) of the Rules of Appellate Procedure,
19 any Notice of Appeal must be filed with the Clerk of Courts
20 within ten days.

21 Richard, do you want us to go ahead and journalize that
22 now or not?

23 MR. SMITH-MONAHAN: Yes, Your Honor.

24 THE COURT: All right.

25 Barb, will you take care of that?

1 COURTROOM DEPUTY: There will be an appeal?

2 THE COURT: There will be an appeal, so will you take
3 care of docketing a notice?

4 COURTROOM DEPUTY: Yes.

5 THE COURT: Anything else at this time, guys?

6 MR. OAKLEY: Not from the United States.

7 MR. SMITH-MONAHAN: What did you decide on house
8 arrest, Judge?

9 THE COURT: Oh, excuse me. Good point. He can
10 report as designated when the Bureau of Prisons notifies him,
11 but he is to continue on the same terms and conditions that he
12 has previously been under.

13 MR. SMITH-MONAHAN: Thank you, Your Honor.

14 MR. OAKLEY: Thank you, Your Honor.

15 THE COURT: Thank you.

16 COURTROOM DEPUTY: This court is in recess for five
17 minutes.

18 (The proceedings concluded at 4:00 p.m.)

19 C E R T I F I C A T E

20 I CERTIFY THAT THE FOREGOING IS A CORRECT TRANSCRIPT FROM
21 THE RECORD OF PROCEEDINGS IN THE ABOVE-ENTITLED MATTER.

22

23 S/MARYANN T. MAFFIA, RDR

24 Official Court Reporter

25